MOTION FILED
JUN 2 5 1999

(14)

No. 98-8384

In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, Warden, Sussex I State Prison,

Respondent.

On A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

MOTION OF MARVIN E. FRANKEL, JAMES K. LOGAN, LAWRENCE W. PIERCE, GEORGE C. PRATT AND HAROLD R. TYLER FOR LEAVE TO APPEAR AS *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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Movants Marvin E. Frankel, James K. Logan, Lawrence W. Pierce, George C. Pratt and Harold R. Tyler respectfully request leave to appear as *amici curiae* in this matter by filing a brief in support of the Petitioner. Movants file their brief herewith pursuant to Supreme Court Rule 37.3(b).

Movants have sought consent to their appearance as *amici curiae* from Petitioner Terry Williams and Respondent John B. Taylor, Warden of the Sussex I State Prison. Although Petitioner has consented, Respondent has denied consent.

Movants are five former Article III judges. Marvin E. Frankel sat on the United States District Court for the Southern District of New York from 1965 until 1978. James K. Logan sat on the United States Court of Appeals for the Tenth Circuit from 1977 until July 15, 1998. Lawrence W. Pierce sat on the United States District Court for the Southern District of New York from 1971 to 1981 and on the United States Court of Appeals for the Second Circuit from 1981 to 1995. George C. Pratt sat on the United States District Court for the Eastern District of New York from 1976 to 1982 and on the United States Court of Appeals for the Second Circuit from 1982 to 1995. Harold R. Tyler Jr. sat on the United States District Court for the Southern District of New York from 1962 to 1975.

During the course of their judicial careers, movants exercised in thousands of cases the judicial power described in Article III of the Constitution. Hundreds of those cases involved petitions for habeas corpus filed by individuals incarcerated by state governments. The

potential *amici* therefore have a great interest in ensuring that this Court adopts an interpretation of 28 U.S.C. § 2254(d)(1) that does not infringe on the independence and powers of the judicial department.

Movants have demonstrated their interest in the separation of powers questions raised by various interpretations of 28 U.S.C. § 2254(d)(1) by participating as *amici curiae* in the courts of appeal regarding this issue. For example, Marvin E. Frankel, James K. Logan, Lawrence W. Pierce, George C. Pratt, and Harold R. Tyler, Jr. have briefed this issue in their role as *amici curiae* before the Second Circuit in *Ramirez v. Senkowski*, No. 98-2625 (2d Cir., scheduled for argument June 24, 1999), and *Vasquez v. Strack*, No. 98-2590 (2d Cir., scheduled for argument June 24, 1999). Likewise, Marvin E. Frankel has briefed this issue in his role as *amicus curiae* before the United States Court of Appeals for the Seventh Circuit in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd*, 117 S. Ct. 2059 (1997).

This Court has granted certiorari with respect to, among other things, whether the Fourth Circuit's interpretation of the "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d)(1) is correct. *Williams v. Taylor*, ___ U.S. ___, 119 S. Ct. 1355 (1999). In answering this question, this Court must examine the Constitution to avoid adopting an interpretation of section 2254 that would raise any question as to its constitutionality. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989). In their brief, movants propose to address separation of powers issues raised by the Fourth Circuit's interpretation of those clauses. Their discussion is, therefore, of interest to this Court.

Movants also propose to argue that the "clearly established Federal law, as determined by the Supreme Court" clause of section 2254(d)(1) raises serious questions whether Congress has impinged on the province of the federal judiciary, in violation of Article III of the Constitution. They will argue that because the proper interpretation of this language does not bear on the outcome of the instant case, and because this Court should not address constitutional questions needlessly, *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (discussing "the prudential concern that constitutional issues not be needlessly confronted"), this Court should defer rendering an interpretation of this language until the question is squarely presented. Movants' discussion of this issue is, therefore, of interest to the Court as well.

Based upon the above, movants respectfully request that the Court accept their brief for filing.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amici curiae are five former Article III judges. Marvin E. Frankel sat on the United States District Court for the Southern District of New York from 1965 until 1978. James K. Logan sat on the United States Court of Appeals for the Tenth Circuit from 1977 until July 15, 1998. Lawrence W. Pierce sat on the United States District Court for the Southern District of New York from 1971 to 1981 and on the United States Court of Appeals for the Second Circuit from 1981 to 1995. George C. Pratt sat on the United States District Court for the Eastern District of New York from 1976 to 1982 and on the United States Court of Appeals for the Second Circuit from 1982 to 1995. Harold R. Tyler, Jr. sat on the United States District Court for the Southern District of New York from 1962 to 1975.

During their judicial careers, *amici curiae* exercised "[t]he judicial Power," U.S. Const. art. III, § 1, in thousands of cases, including hundreds brought pursuant to 28 U.S.C. § 2254 and many others that presented questions concerning Congress' power to regulate the judicial department. For the reasons discussed below, *amici curiae* believe that the Fourth Circuit's interpretation of 28 U.S.C. § 2254(d)(1) raises serious separation of powers concerns, and that their prior experience, as well as their deep concern that the judiciary remain empowered to play the role Article III envisions, provide them with a

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[1] *Amici curiae* state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. made a monetary contribution to the preparation and submission of this brief.

unique perspective on this issue that could be of aid to the Court.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Petitioner Terry Williams.

SUMMARY OF ARGUMENT

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). Title I amends the existing habeas corpus statute, 28 U.S.C. § 2241 *et seq.*, and "works substantial changes" upon the federal authority to grant habeas petitions. *Felker v. Turpin*, 518 U.S. 651, 654 (1996). 28 U.S.C. § 2254(d)(1), which is at issue in this case, codifies for the first time a standard of adjudication for habeas corpus proceedings:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

This Court has granted certiorari with respect to the proper interpretation of the "contrary to" and "unreasonable application of" clauses of 28 U.S.C. § 2254(d)(1).

Williams v. Taylor, ___ U.S. ___, 119 S. Ct. 1355 (1999).[2] It has denied certiorari with respect to whether the Fourth Circuit's interpretation thereof violates the Constitution. *Id.* Nonetheless, in answering the question presented, this Court must examine the Constitution to avoid adopting an interpretation of section 2254 that would raise a question as to its constitutionality. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989). This Court has held that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). This Court applies this principle not only when a statute would otherwise be unconstitutional but also when there exists "a serious doubt of constitutionality." *Public Citizen*, 491 U.S. at 465-66 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

This rule derives from the need for the separation of powers and for the consequent respect that the judicial branch must accord to the legislative branch: "This approach . . . recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103

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[2] The Court has also granted certiorari with respect to several questions regarding the standards for ineffective assistance of counsel claims, which this brief will not address.

Harv. L. Rev. 407, 469 (1989) (noting that this doctrine "is a natural outgrowth of the system of separation of powers [and] minimizes interbranch conflict"). Accordingly, this principle of statutory construction is of "cardinal" importance. *Public Citizen*, 491 U.S. at 465-66 (quoting *Crowell*, 285 U.S. at 62); *see also Edward J. DeBartolo Corp.*, 485 U.S. at 575 (calling this principle "beyond debate"); *Hooper*, 155 U.S. at 657 (calling this principle an "elementary rule").

As *amici curiae* discuss below in part II, the construction placed on the "unreasonable application" clause of section 2254(d)(1) by the Fourth Circuit in this and other cases poses difficult and troubling questions concerning whether Congress has encroached upon the essential constitutional prerogative of the federal courts to say what the law is and to effectuate their conclusions in a manner that preserves the supremacy of national law. *Amici curiae* therefore urge this Court to reject that interpretation in favor of a standard of review that achieves the goal of respecting state court decisions without incurring the unconstitutional consequence of impairing federal courts' independence. The "contrary to" clause of this provision, which allows for plenary review, is such a standard of review. *Amici curiae* therefore urge the Court to reject the Fourth Circuit's narrow holding regarding when this standard of review should be applied.

As set forth below in part III, the "clearly established by Federal law, as determined by the Supreme Court" clause of section 2254(d)(1) also raises serious questions whether Congress has impinged on the province of the federal judiciary, in violation of Article III of the Constitution. However, the proper interpretation of this language does not bear on the outcome of the instant case, because petitioner's claims rely on this Court's ruling in *Strickland v. Washington*, 466 U.S. 668 (1984). *See* Petition

for Certiorari at p. *i*. Therefore, in accordance with the principle that this Court should not address constitutional questions needlessly, *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (discussing "the prudential concern that constitutional issues not be needlessly confronted"), *amici curiae* respectfully urge this Court to defer rendering an interpretation of this language until the question is squarely presented.

ARGUMENT

I. THE DOCTRINE OF SEPARATION OF POWERS AND THE NATURE OF THE JUDICIAL POWER DEMAND 1) THAT THE JUDICIAL DEPARTMENT BE THE SUPREME INTERPRETER OF THE CONSTITUTION, 2) THAT IT NOT BE PREVENTED FROM ADHERING TO PROPER INTERPRETATIONS OF THE CONSTITUTION, 3) THAT IT NOT BE REQUIRED TO GIVE ADVISORY OPINIONS, AND 4) THAT IT BE PERMITTED TO GIVE *STARE DECISIS* EFFECT TO ITS RULINGS ON ISSUES OF CONSTITUTIONAL LAW.

History and jurisprudence teach that our system of government – which preserves the right of political participation and the ability to exercise civil rights – is carefully crafted and fragile. The Framers "had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983). They "lived among the ruins of a system of intermingled legislative and judicial powers . . . which after the Revolution had produced factional strife and partisan oppression." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995). Mindful of this experience, they created a government in which the natural tendency of each branch to exercise as much power as possible would balance and check the similar tendencies of every

other branch. *Id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (recognizing that the Founders "viewed the principle of separation of powers as a vital check against tyranny").

"[T]he doctrine of separation of powers . . . is at the heart of our Constitution." *Buckley*, 424 U.S. at 119. As this Court has observed, it "was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Id.* at 124. Thus, the Constitution created the legislative, executive and judicial departments "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *Chadha*, 462 U.S. at 951. The Founders, as "practical statesmen, experienced in politics," *Buckley*, 424 U.S. at 121, recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.* A department oversteps its bounds, however, when it intrudes on the "functionally identifiable" power of another. *Chadha*, 462 U.S. at 951; *see also Plaut*, 514 U.S. at 228 ("Not favoritism, nor even corruption, but power is the object of the separation-of-powers prohibition.").

The Founders were particularly afraid of the unchecked power of the legislature – "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley*, 424 U.S. at 129; *see also Plaut*, 514 U.S. at 220-21 (listing post-revolutionary era bodies that "decried the increasing legislative interference with the private-law judgments of the courts"). James Madison warned of

> "the danger from legislative usurpations; which by assembling all power in the same hands,

> must lead to the same tyranny as is threatened by executive usurpations. . . . [I]t is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.
>
> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."

Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273-74 (1991) (quoting *The Federalist No. 48*, pp. 332-34 (J. Cooke ed. 1961)). This Court "has not hesitated," *Buckley*, 424 U.S. at 123, therefore, to strike down legislative acts that have impinged on the powers of the other branches. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997); *Plaut*, 514 U.S. 211; *Metropolitan Wash. Airports Auth.*, 501 U.S. 252; *Bowsher v. Synar*, 478 U.S. 714 (1986); *Chadha*, 462 U.S. 919; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Although the separation of powers is important to each of the three branches of government, it is critical for the judicial department, which must be careful to avoid even the impression that it has been influenced by political considerations. The judiciary, unlike the other two departments,

> cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the

> Nation's law means and to declare what it demands.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992). In order to maintain their legitimacy, both in fact and in the eyes of society, federal courts are careful to decide their cases in a manner that is logical and consistent. "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." *Id.* at 866. Deciding cases in a principled manner is thus essential to the legitimacy of the judicial department and, ultimately, to its survival.

Congressional incursions into the way in which the judicial department decides cases are, therefore, dangerous to the integrity of the judicial department. Article III, section I of the Constitution provides: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This explicit allocation of power "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (internal citations and quotation marks omitted).

This Court laid out the contours of "the judicial Power" in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In that case, Marbury requested the Court to issue a writ of mandamus against Secretary of State Madison, who had refused to deliver Marbury's commission as justice of the peace which the previous Secretary of State had signed and sealed. Section 13 of the Judiciary Act of 1789 bestowed original mandamus jurisdiction on this Court. Article III of the Constitution, however, gave the

Court original jurisdiction in only "one class of cases," which did not include mandamus, so section 13 was "not . . . warranted by the Constitution." *Id.* at 174-77.

This raised the famous question: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" *Id.* at 177. In answering this question, Chief Justice Marshall described the fundamental nature of the judicial power. "It is emphatically the province and duty of the judicial department to say what the law is" – to interpret the Constitution. *Id.* Congress cannot impinge on this duty by requiring Article III courts to ignore any part of the Constitution and to instead give effect to a contrary law:

> [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; *the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which both apply.

Id. at 178 (emphasis added).

This Court elaborated on the nature of the judicial power in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In that case, a Confederate sympathizer – who had been granted a Presidential pardon restoring all rights of property to ex-Confederates who signed a loyalty oath – sued for the proceeds of property confiscated by the government during the Civil War. The Court of Claims had decided that such a pardon entitled the claimant to

payment for confiscated property. *See United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869). Congress then passed a law making such pardons conclusive evidence that the bearer had aided in the rebellion which resulted in dismissal of the claim. If the Court of Claims had already ruled in the claimant's favor, the statute deprived this Court of appellate jurisdiction and directed dismissal of the case, thus denying the plaintiff relief. *Klein*, 80 U.S. (13 Wall.) at 133-34.

This Court held that this attempt to "prescribe rules of decision" violated the separation of powers in two ways. *Id.* at 147. First, it prohibited the Court from giving "the effect to evidence which, in its own judgment, such evidence should have," and directed the Court to "give [the evidence] an effect precisely the contrary." *Id.* As the Court explained:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of the cause in a particular way?. . . . Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id. at 146-47. Second, it not only dictated the logical (or illogical) processes the Court should follow, but it did so as a means to an end:

> We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

Id. at 146. Taken together, *Marbury* and *Klein* and their progeny describe four characteristics of the judicial power upon which Congress cannot impinge.

A. Once Congress Grants Article III Courts Jurisdiction to Decide a Case, It Cannot Impair the Courts' Ability to Interpret and Independently Supply the Full Meaning of the Constitution.

As noted above, declaring the meaning of federal law "is the very essence of judicial duty." *Marbury*, 5 U.S. (1 Cranch) at 178. "When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." *Flores*, 117 S. Ct. at 2172. Thus, it is firmly established that neither Congress nor non-Article III courts can interfere with the exercise of this power by overturning a federal court's interpretation of the Constitution.[3] *Id.* (defeating an attempt by Congress to overrule an Article III court's interpretation of the Constitution); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (defeating a similar attempt by a state court).

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[3] Of course, Congress can correct the judiciary's reading of federal statutes. *See, e.g.*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (amending Title VII of the Civil Rights Act of 1964 in response to this Court's opinion in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989)). But Congress' only remedy when it disagrees with the judiciary's constitutional jurisprudence is to seek to amend the Constitution. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855) (distinguishing between public rights, over which Congress has plenary authority, and private rights, over which Congress does not have authority); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (noting that in the realm of statutory interpretation, "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done").

Although Congress need not grant jurisdiction to the lower Article III courts, once it does so, "*Marbury* indicates that the court's interpretational duty is that of supplying the full meaning of the relevant constitutional provisions."[4] Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 6 (1983). Accordingly, this Court repeatedly has recognized a constitutionally crucial difference between withdrawing jurisdiction entirely and granting jurisdiction but forbidding its independent exercise. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995) ("Congress may be free to establish a . . . scheme that operates without court participation" but may not "instruct[ ] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate."); *Plaut*, 514 U.S. at 219-23; *Klein*, 80 U.S. (13 Wall.) at 145-47; *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It

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[4] Congress has always placed strict limits on when federal courts have jurisdiction to review, and thus deny effect to, state court decisions that violate federal law. *See, e.g.*, Full Faith and Credit Act, Act of May 26, 1790, ch. 11, 1 Stat. 122; Anti-Injunction Act, Act of March 2, 1793, ch. 23, § 5, 1 Stat. 333, 334-35. These doctrines exercise a quantitative Congressional power to confer jurisdiction, not a qualitative congressional power to determine the manner in which judicial power is exercised. James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 779-82 (1998). In contrast, Congressional control of the quality of judicial decisionmaking was rejected as early as the Constitutional Convention, where the delegates soundly defeated a motion to insert into Article III a provision that "the judicial power shall be exercised in such manner as the Legislature shall direct." 1 *The Records of the Federal Convention of 1787* 425, 431 (Max Farrand ed., 1911) (Aug. 27, 1787) (hereinafter "Farrand").

is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements. . . . [W]henever the judicial power is called into play, [the Court] is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it."). Whether addressing pure legal issues or mixed questions of law and fact, the judicial power, therefore, requires

> independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text. . . . There is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be "jurisdictionally" shut off from full consideration of the substantive constitutional issues.

Monaghan, *supra*, at 9, 11.

> In particular, this Court has never
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> held in the past that federal courts must presume the correctness of state court legal conclusions . . . or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have the independent obligation to say what the law is.

Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring). Thus, when Congress grants an Article III court jurisdiction to review another tribunal's decision regarding an issue of constitutional law, the latter's "declaration or finding is necessarily subject to independent judicial review upon the facts and the law . . . to the end that the Constitution as the supreme law of the land be maintained." *St. Joseph's Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936). A federal judge, therefore, " 'may not defer to [state court] findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently.' " *Wright*,

505 U.S. at 301 (O'Connor, J., concurring) (quoting *Townsend v. Sain*, 372 U.S. 293, 318 (1963)); *see also Miller v. Fenton*, 474 U.S. 104, 110 (1985). "If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.).

B. Congress Cannot Prevent the Lower Federal Courts from Applying the Entire Body of Constitutional Law to Cases Before Them.

As this Court ruled in *Marbury*, Congress *cannot* prevent federal judges from applying the entire body of federal law, and especially the Constitution, to cases over which they have been given jurisdiction. Faced with the question whether a statute that violated the Constitution could bind the federal courts, Chief Justice Marshall ruled that the judicial department had the power to determine "which of these conflicting rules governs the case." 5 U.S. (1 Cranch) at 178. The Court expressly rejected the claim by "[t]hose . . . who controvert the principle that the constitution is to be considered, in court, as a paramount law, . . . that courts must close their eyes on the constitution, and see only the law." *Id.* at 177-78. The dilemma, as Marshall construed it, is that a case "arising under the constitution [cannot] be decided without examining the instrument under which it arises. . . . In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what parts of it are they forbidden to read, or to obey?" *Id.* at 179. The question suggests the only appropriate answer: none.

C. Congress Cannot Constitutionally Render Decisions Advisory by Stripping the Federal Courts of Their Power to Decide Cases and Effectuate Their Decisions.

The "framers crafted th[e] charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that . . . a 'judicial Power' is one to render dispositive judgments." *Plaut*, 514 U.S. at 218-19. Once it has granted jurisdiction to decide a case, Congress may not withhold from the federal courts the power to effectuate their independent judgments and make them binding on the parties, which is "an essential part of . . . the exercis[e of] judicial power." *Gordon v. United States*, 117 U.S. 697, 702 (decided 1864, reported 1885). A power characterized by judicial decisions which are "inoperative and nugatory . . . without any operations upon the rights of the parties . . . is not the judicial power." *Id.*

Accordingly, Article III forbids Congress to grant a federal habeas court jurisdiction to review a state court legal decision and then require the court to defer to the state decision. Whatever else may be true of Congress' ability to limit judicial remedies, it has been clear for well over a century that Congress cannot grant Article III courts jurisdiction to decide a case and then force them to surrender that jurisdiction at the moment the federal courts' independent interpretation of supreme law calls for relief sufficient to nullify state decisional law in conflict with supreme national law. *Klein*, 80 U.S. (13 Wall.) at 145-47. Congress cannot, therefore, enlist federal courts to scrutinize state decisions for consistency with the Constitution and then require them to leave in force and effect

what they have independently determined to be in conflict with the "supreme Law of the Land." U.S. Const. art. VI, § 2. No precedent exists allowing federal courts to give effect to state decisional law which they have independently determined is inconsistent with the supreme law of the land. Indeed, such a rule would both corrupt and trivialize "the judicial Power" by deeming constitutionally sufficient a role for federal judges which is beyond the judicial power: the giving of advisory opinions.[5] *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (holding that federal courts lack the power to render advisory opinions).

D. Congress Cannot Prevent the Lower Federal Courts from Adhering to Stare Decisis.

These three rules discussed above, all based upon the fundamental principle of separation of powers, do not exhaust all possible breaches thereof. "Violations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two. Nevertheless, the Court has been sensitive to its responsibility to enforce the principle when necessary." *Metropolitan Wash. Airports Auth.*, 501 U.S. at 272. Thus, in *Plaut*, this Court acknowledged that apart from the statute at issue, it knew "of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation," 514

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[5] The roots of the prohibition on advisory opinions run deep. For example, the Constitutional Convention rejected proposals that the Supreme Court provide opinions "upon important questions of law, and upon solemn occasions" at the request of the President or Congress. 2 Farrand, at 367 (Aug. 22, 1787).

U.S. at 230, but it nonetheless held that such an attempt "offend[ed] a postulate of Article III just as deeply rooted in our law" as those previously developed by the Court. *Id.* at 218.

A Congressional attempt to undermine the *stare decisis* effect of rulings on constitutional issues by lower Article III judges would be a similarly offensive breach of the separation of powers. *Stare decisis* is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Because *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and fact," *id.* at 265-66, it is essential to the legitimacy of the judicial department. *See generally Planned Parenthood of Southeastern Pa.*, 505 U.S. at 866. As Justice Thurgood Marshall warned, "*Stare decisis* should be more than a fine-sounding phrase. This is especially true for us, because unless we respect the decisions of this Court, we can hardly expect that others will do so." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 599 (1977) (Marshall, J., dissenting).

Stare decisis is particularly important with respect to the rulings by Article III judges regarding issues of constitutional interpretation. Because the federal judiciary is charged with the primary responsibility to interpret the Constitution, once it has done so Congress cannot alter or correct that interpretation. *See* discussion *supra* part I.A. Nor, therefore, ought Congress be able to rob the constitutional holdings of the federal judiciary of their *stare decisis* effect:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it

> must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Flores, 117 S. Ct. at 2172.

Congress recently tested this principle by passing the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, in an attempt to expand the religious freedom protections of the First Amendment beyond the limits established by this Court in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Recognizing that Congress was attempting to deprive *Smith* of its *stare decisis* effect and to take from the federal judiciary its ability to have the final word regarding the meaning of the Constitution, this Court struck RFRA down as violative of Article III, warning: "[A]s the provisions of the federal statute here invoked are beyond Congressional authority, it is this Court's precedent, not RFRA, which must control." *Flores*, 117 S. Ct. at 2172.

Congress' inability to rob the holdings of federal courts on constitutional matters of their *stare decisis* effect extends to holdings of circuit courts, which have *stare decisis* effect, subject only to overruling by the circuit en banc and by this Court. *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786, 788 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982). As this Court recently ruled, the Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19; *see also id.* at 227 (emphasizing that Article III creates "not a batch of unconnected courts, but a judicial department composed of 'inferior Courts' and 'one supreme Court' "). Thus, although this Court has never before been faced with precisely this question, it is manifest that any attempt by Congress to lift the *stare decisis*

effect of circuit courts' constitutional rulings would violate the separation of powers doctrine.

II. THE COURT SHOULD AVOID AN INTERPRETATION OF THE "UNREASONABLE APPLICATION" CLAUSE OF SECTION 2254(d)(1) THAT WOULD IMPAIR "THE JUDICIAL POWER."

Under the plain language of 28 U.S.C. § 2254(d)(1), in reviewing a claim that was decided on its merits in a state court, a federal court must focus its review on the state court "decision," and shall grant habeas relief only when the state court decision "was contrary to" or "involved an unreasonable application" of clearly established Federal law. In this and other cases, the Fourth Circuit has limited use of plenary review under the "contrary to" clause to cases with indistinguishable facts and identical legal issues. *Williams v. Taylor*, 163 F.3d 860, 866 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, 119 S. Ct. 1355 (1999); *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 844 (1999). Under this interpretation, virtually all claims will be analyzed under the "unreasonable application" clause. Other circuits have proffered interpretations of this clause which would permit more cases to be reviewed under this standard. *See, e.g., Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888-89 (3d Cir. 1999); *O'Brien v. Dubois*, 145 F.3d 16, 24-25 (1st Cir. 1998). These interpretations are more faithful to the clear language of the statute. Moreover, review under the "contrary to" clause is plenary and thus avoids raising the constitutional questions discussed herein.

In violation of the settled separation of powers principles discussed above, the Fourth Circuit has interpreted section 2254(d)(1) to hold that Congress requires federal courts to defer to state court decisions. Under this

interpretation, "habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Green*, 143 F.3d at 870.

Although the Fifth, Seventh and Eleventh Circuits have adhered to similar standards of review, *see Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); *Neelly v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 811 (1999), other circuits have criticized this interpretation as requiring federal courts to grant too much deference to state court rulings on issues of constitutional law. *O'Brien*, 145 F.3d at 25 (criticizing the Fourth Circuit's interpretation as "too deferential . . . [g]iven that reasonable judges occasionally make unreasonable decisions"); *Matteo*, 171 F.3d at 889 (rejecting the approach of the Fourth Circuit because it "unduly discourages the granting of relief insofar as it requires the federal habeas court to hold that the state court judges acted in a way that no reasonable jurists would under the circumstances," and noting that this approach "has the tendency to focus attention on the reasonableness of the jurists rather than the merits of the decision itself"). Unfortunately, the First Circuit's approach falls into the very error that it criticizes. *See Matteo*, 171 F.3d at 889 (noting of the First Circuit's "outside the universe of plausible, credible outcomes" standard that "its effect would be to render the 'unreasonable application' clause a virtual nullity, as granting habeas relief would require an explicit finding that the state court decision – often, a decision of the state's highest court – was so far off the mark as to suggest judicial incompetence"). Attempting to avoid this

error, the Third Circuit has held that a state court decision is an "unreasonable application" if the "state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Id.* at 890.

As is clear from this discussion, in developing standards of review under the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1), the "crux of the debate has been what degree of deference, if any, AEDPA requires a federal habeas court to accord a state court's construction of federal constitutional issues and interpretation of Supreme Court precedent." *Id.* at 885. The federal courts' duty to preserve the supremacy of federal law proscribes deference:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law.

Ornelas v. United States, 517 U.S. 690, 697 (1996) (citation omitted). Once a federal court is directed to decide a case, it has an independent obligation to declare the law and cannot defer to an erroneous state court decision. *See* discussion *supra* at 13-14. Any limitation on this obligation interferes with the constitutional function of the federal courts to give meaning to constitutional principles. Congress cannot, therefore, through section 2254(d)(1) constitutionally require federal courts to defer to a state court's erroneous determination of federal law.

The Fourth and Seventh Circuits have wrongly argued that their construction of the "unreasonable application" clause of section 2254(d)(1) escapes the constitutional error of limiting federal courts' ability to

independently interpret the Constitution because federal courts "are free, if [they] choose, to decide whether a habeas petitioner's conviction and sentence violate any constitutional rights. Section 2254(d) only places an additional restriction upon the scope of the habeas remedy in certain circumstances." *Green*, 143 F.3d at 875 (citing *Lindh*, 96 F.3d at 872). Under such an interpretation of section 2254(d)(1), however, federal courts are enlisted to do precisely what *Klein* forbids: scrutinize state legal decisions for consistency with the Constitution, then leave in force and effect that which they have independently determined to be in conflict with the "supreme Law of the Land." U.S. Const. art. VI, § 2. The independence of federal courts is not preserved simply because they "are free to express an independent opinion on all legal issues in the case." *Lindh*, 96 F.3d at 869. On the contrary, limiting the authority of federal courts to the mere expression of an independent opinion renders their opinions unconstitutionally advisory. *See* discussion *supra* part I.C.

The Fourth and Seventh Circuits have also concluded incorrectly that their interpretations of section 2254(d) place no greater constraint on federal judges than do other accepted doctrines such as limitations on federal court jurisdiction, deference to administrative interpretations, qualified immunity, and the rule of *Teague v. Lane*, 489 U.S. 288 (1989). *See Lindh*, 96 F.3d at 871-73; *Green*, 143 F.3d at 875. None of these doctrines, however, impugns federal judges' power "not merely to rule on cases, but to decide them. . . . " *Plaut*, 514 U.S. at 218-19. As noted above, in the Full Faith and Credit and Anti-Injunction Acts Congress has exercised a quantitative power to determine the extent of jurisdiction and not, as here, a qualitative power to control the manner in which the judicial power is exercised. *See* discussion *supra* at 12 n.4.

The doctrine of deference in administrative law identifies situations in which Congress delegates to an agency the task of defining statutory terms. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the federal court independently decides whether the agency has acted within a statutorily delegated power to make supplementary law and, if so, the court complies with the statutory command to treat the law supplied by the delegate of Congress as it treats the law supplied by Congress itself. The same analysis applies to the "political question" doctrine, except that the Article III court must independently interpret the Constitution itself to see whether it gives Congress the duty to define an ambiguous constitutional provision. *See* Herbert Weschler, *Toward National Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7-8 (1959). In neither of these contexts is the independent judgment of the federal courts impaired.

Moreover, the rule of *Teague* does not "establish a disjunction between the meaning of the Constitution and the use of habeas corpus." *Lindh*, 96 F.3d at 872. Indeed, *Teague* comports with the federal courts' essential supremacy-maintaining function by employing plenary federal review to insure that the state court, in accordance with its Supremacy Clause obligations, " 'appl[ied] the constitutional standards that prevailed at the time the original proceedings took place.' " *Teague*, 489 U.S. at 306 (quoting *Desist v. United States*, 394 U.S. 244, 263 (1969)); *see also Saffle v. Parks*, 494 U.S. 484, 488 (1990) (holding that the "foremost" purpose of habeas "is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings"); *Wright*, 505 U.S. at 307 (Kennedy, J., concurring) (noting that the relevant question in a habeas proceeding is whether a conviction "was obtained in

accordance with the constitutional interpretations existing at the time of the prisoner's conviction"); *id.* at 304 (O'Connor, J., concurring) ("*Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final."). In contrast, the Fourth Circuit's interpretation of section 2254(d)(1) would require a federal court to give effect to state court interpretations of the Constitution independently determined by the federal court to be erroneous and to have been erroneous at the time that the state court acted.

Furthermore, it is error to equate the denial of relief from an erroneous state court decision with the denial of damages to a plaintiff in a civil rights action under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *Cf. Green*, 143 F.3d at 875; *Lindh*, 96 F.3d at 873. Only because the Fourth and Seventh Circuits apparently believe that state court judges make no law when they apply rules to facts can they equate denying relief from an erroneous state court decision with denying damages to a citizen unconstitutionally rousted from his home at the end of a police officer's nightstick. Yet a state judge's "wrong" decision makes "law" in a way that a police officer's unconstitutional search can never do. That is why the Supremacy Clause singles out "the Judges in every State," not the constables, as those whose unique law-making function requires that they be "bound" by the "supreme Law of the Land." U.S. Const. art. VI. And that is why the federal courts' essential function of keeping federal law supreme requires them to annul every constitutionally erroneous legal decision of a state court properly before them, but not to remedy every police officer's constitutional tort. *See* Liebman & Ryan, *supra*, p. 879.

An interpretation of section 2254(d)(1) which, like the Fourth Circuit's, requires federal courts to take the unprecedented step of deferring to state court rulings on issues of federal constitutional law, threatens the independence of "the Judicial power" and undermines the very foundation of our constitutional system by fundamentally altering the manner in which federal judges decide constitutional issues. *Amici curiae* therefore respectfully urge this Court to reject the Fourth Circuit's interpretation in favor of one that achieves the goal of respecting state court decisions without encroaching upon the essential constitutional prerogative of the federal courts to say what the law is and to effectuate their conclusions in a manner that preserves the supremacy of national law. Further, because the "contrary to" clause provides a constitutional standard of review, *amici curiae* urge the Court to reject the Fourth Circuit's narrow holding regarding when this standard of review should be applied.

III. THE COURT SHOULD AVOID INTERPRETING THE "CLEARLY ESTABLISHED BY FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT" CLAUSE OF 28 U.S.C. § 2254(d)(1), BECAUSE IT RAISES SERIOUS CONSTITUTIONAL QUESTIONS AND IS NOT SQUARELY PRESENTED BY THIS CASE.

The "clearly established by Federal law, as determined by the Supreme Court" clause of 28 U.S.C. § 2254(d)(1) works a substantial change from previous law by prohibiting federal courts from granting a habeas petition when the state court ruling appealed from conflicts with or is an unreasonable application of circuit

court holdings.[6] *See Sweeney v. Parke*, 113 F.3d 716, 718 (7th Cir. 1997) ("[Circuit courts are] no longer permitted to apply [their] own jurisprudence, but must look exclusively to Supreme Court caselaw."); *Lindh*, 96 F.3d at 869 (holding that section 2254(d)(1) "is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court"); *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir.), *cert. denied*, 521 U.S. 1111 (1997).

This change raises serious separation of powers concerns. In accordance with the Court's long-standing policy of avoiding unnecessary constitutional issues, and because the interpretation of this clause is not here before the Court, *amici curiae* respectfully urge the Court not to interpret this clause in this case.

The "clearly established by Federal law, as determined by the Supreme Court" clause of section 2254(d)(1), like the statute invalidated in *Klein*, prevents

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[6] Several circuits have held that federal courts may consider the opinions of lower federal courts when determining whether a state court interpretation of this Court's precedent was reasonable. *See, e.g., O'Brien*, 145 F.3d at 21, 25; *Matteo*, 171 F.3d at 890; *Mata v. Johnson*, 99 F.3d 1261, 1269 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). Several circuits have also interpreted this clause as permitting the consideration of "the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent." *Matteo*, 171 F.3d at 890; *Green*, 143 F.3d at 882 (implying that habeas could be granted based upon a lower federal court "opinion which simply makes explicit a proposition of law that was implicit but nonetheless clearly established in previous Supreme Court caselaw"). However, no circuit has yet held that a federal court can grant habeas when the state court ruling was contrary to or an unreasonable application of lower federal court precedent that did more than merely add a gloss to existing Supreme Court precedent.

Article III courts from exercising "[their] own judgment" and instead "prescribe[s] a rule for decision of the cause." It does so in two respects. First, by preventing all Article III courts from turning to the decisions of lower Article III courts in deciding habeas cases, it prevents them from applying the entire body of supreme federal law to cases before them. *See* discussion *supra* part I.D. Federal judges are thus forced, in violation of *Marbury*, to choose between section 2254(d)(1) and their duty to apply the entire Constitution to cases properly before them. For example, even if every circuit court were in agreement that the Constitution as construed by this Court protected a particular right, and even if they had been in agreement regarding this principle for several decades, a federal habeas court could not grant a petition based on that right if this Court had not issued an opinion on point. In fact, even if this Court's precedents indicated that it would create a particular rule when it was confronted with the right set of facts, and even if every circuit to reach the issue had relied upon that rule in anticipation of this Court's decision, a federal habeas court still could not grant a petition based on that rule. "To require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court of the United States directly on point, is to deny it the right to refer to the corpus of jurisprudence to which it turns when it must 'say what the law is.' " *Lindh*, 96 F.3d at 887 (Ripple, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

Of course, in exercising the judicial power to decide cases before them federal courts must decide only the question presented. For example, under this Court's rule in *Teague*, with limited exceptions habeas courts can grant relief only if the state court failed to follow the law in effect at the time when the petitioner's conviction and

sentence became final – they cannot apply more recent law, even Supreme Court precedent. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). However, *Teague* is distinguishable from section 2254(d)(1) in two ways. First, as a judge-imposed rule *Teague* affirms, rather than undermines, the separation of powers. *Compare Plaut*, 514 U.S. at 234-35 (noting that Fed. R. Civ. P. 60(b)(5) does not create separation of powers problems because it "does not impose any legislative mandate-to-reopen on the courts, but merely reflects and confirms the courts' own inherent and discretionary power"). Second, *Teague* accords with the purpose of habeas corpus, which is to ensure that state courts follow the supreme federal law in effect at the time of their decision, including circuit court rulings. *See* discussion *supra* at 23-24. Indeed, federal habeas courts applying *Teague* have traditionally examined state court decisions to ensure that they comport with the entire body of federal constitutional law, including decisions of circuit courts. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333 (1983) (considering whether a Seventh Circuit case announced a new rule under *Teague*); *Ciak v. United States*, 59 F.3d 296, 302-03 (2d Cir. 1995) (granting habeas based on circuit precedent). Section 2254(d)(1), in contrast, requires Article III judges to ignore long-standing and widely accepted circuit court precedent, and it permits state court judges to do the same.

The second, and even more troubling, respect in which the "clearly established by Federal law, as determined by the Supreme Court" clause raises serious separation of powers questions is that it requires inferior federal courts to ignore not only the holdings of other circuits but also their own jurisprudence and that of superior courts. Pursuant to this provision, lower Article III courts must refuse to grant a habeas petition when, according to circuit court precedent, state trial courts

committed constitutional error, if this Court has not yet addressed the issue. Thus, district and circuit courts must ignore binding precedents of the courts of appeals in their own circuits, when those precedents have not been clearly established by this Court. Like RFRA, section 2254(d)(1) attempts to remove the *stare decisis* effect from constitutional rulings by Article III courts, in violation of the principles set forth in *Flores*. *See* discussion *supra* part I.D; *see also* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts – Opposition, Agreement, and Hierarchy*, 86 Geo. L.J. 2445, 2467-70 (1998). It therefore raises serious constitutional questions, which this Court should decline to reach unnecessarily here.

CONCLUSION

The Fourth Circuit's interpretation of the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1) poses difficult and troubling questions concerning whether Congress encroached upon the essential constitutional prerogative of the federal courts to say what the law is and to effectuate their conclusions in a manner that preserves the supremacy of national law. *Amici curiae* respectfully urge the Court to interpret this provision in a manner that permits Article III judges to exercise independent judgment on issues of federal constitutional law and does not impair "the Judicial power." Moreover, because the "contrary to" clause of this provision does not raise separation of powers problems, *amici curiae* respectfully urge the Court to reject the Fourth Circuit's narrow interpretation of when to apply the standard of review set forth in that clause.

The "clearly established by Federal law, as established by the Supreme Court" clause of section 2254(d)(1)

also raises important separation of powers issues. However, the interpretation of that provision is not currently before the Court. *Amici curiae* therefore respectfully request this Court to defer interpretation of that clause until required to do so by a pending case.

Respectfully submitted,

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